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Supreme Court of Missouri.

VOGLER v. MONTGOMERY ET AL.

Where an execution-creditor purchases at execution-sale, and his judgment is subsequently reversed and restitution awarded, the title reverts in the execution-debtor, but where, before the reversal, the execution-creditor conveys to a stranger who purchases in good faith, he will hold the title unaffected by the reversal.

An exception to this rule is where the property sold is one that is exempt from sale by the Homestead Act. In such case the purchaser acquiring no title can convey none even to a stranger.

Homestead laws should be liberally construed, with the view of promoting the benevolent purpose of securing to a family, a home protected from the creditors of the person who is its head.

The homestead exemption is for the benefit of the family, and a sale thereof under execution is void. The exemption need not be claimed, and the possession and use of property, as a homestead, are notice to the officer making a levy that it is held as such.

When the homestead exceeds in amount or value the statutory limitation, it is the duty of the officer holding an execution, before making a levy, to proceed under the provisions of the statute to have the homestead appraised and set apart.

The conveyance and repurchase of a homestead, without a relinquishment of possession, even though made in fraud of creditors, does not constitute an abandonment of the homestead.

The sale of a homestead under execution will be restrained in equity, on the ground that it will cast a cloud over the title of the owner.

THIS was an application for an injunction to restrain Montgomery, a trustee in a deed of trust from Nussberger for the benefit of Shields, from selling the lot conveyed in the deed, on the general ground that such sale would cast a cloud on the title of plaintiff.

The facts appeared to be as follows: Vogler acquired the lot and house in the year 1865. Nussberger obtained a judgment against Vogler about the 4th of February 1868. A few days previous to this Vogler conveyed the premises to one Suess, and on January 23d 1869, Suess conveyed back the same to Vogler. On Nussberger's judgment an execution issued; the lot was sold under it, and Nussberger became the purchaser, and a deed from the sheriff to him was executed, bearing date August 6th 1868, and recorded November 6th 1868. There was a mistake in the description of the boundaries of the lot in the deed, as there was in the deed by which it was acquired by Vogler, and a second execution was obtained and levied on the lot, and a sale made under

it to Nussberger, who received a second deed from the sheriff, dated 20th of August 1869, with a correct description of the boundaries of the lot.

At or previous to this second sale the sheriff was notified that Vogler claimed the lot as his homestead. No claim had been asserted at the first sale under execution. Vogler was married and had four children, and he and his family lived on the premises.

The judgment under which these sales were made was reversed on the 24th of December, 1869. The deed from Nussberger to Montgomery for the benefit of Shields was made on the 16th of December 1869.

The petition in this case set forth these facts and asked an injunction to prevent Montgomery from selling under his deed of trust. The court below granted the injunction.

Johnson & Botsford, for Vogler.—1. A sheriff's sale and deed of a homestead are void; *Beecher v. Baldy*, 7 Mich. 506; *Hambelin v. Worneke*, 31 Texas 681; *Kendall v. Clark*, 10 Cal. 17; *Ackley v. Chamberlain*, 16 Cal. 181; and the sale cannot be sustained on the ground that the homestead exceeds the amount in value, limited by law: *Myers v. Ford*, 22 Wis. 139; *Cook v. McChristian*, 4 Cal. 23.

2. The possession by respondent and his family, of the land in controversy, was notice to the world of his homestead right; *Cook v. McChristian*, 4 Cal. 23; *Tylor v. Hargous*, Id. 268; *Holden v. Pinney*, 6 Cal. 234; and he was not required to give the sheriff actual notice of such right: *Wagner Statutes* 697, § 1; *Pardie v. Lindley*, 31 Ill. 187.

3. A conveyance of a homestead without a removal therefrom by the owner and family, does not constitute an abandonment of the homestead, and a repurchase thereof reinvests the homestead right, and will be held as though the same had never been conveyed: 1 *Wagn. Statutes* 699, § 8; *Tumlin v. Swiney*, 22 Ark. 400; *Morgan v. Stearnes*, 41 Verm. 398; *Locke v. Rowell*, 47 N. H. 46; 1 *Am. Law Reg. N. S.* 706, 711, 712; *Fishback v. Lane*, 36 Ill. 437; *Joes v. Mills*, 37 Ill. 73; *Moore v. Dunning*, 29 Ill. 130; *Lamb v. Shay*, 14 Iowa 570; *Dearing v. Thomas*, 25 Geo. 224; *Cox v. Wilder*, 2 Dill. C. C. 45; *Rix v. Capitol Bank*, Id. 367; *Bartholomew v. West*, Id. 290.

4. A sale by Montgomery would draw a hurtful cloud over the title of respondents, and will be restrained by a court of equity.

Philips & Vest, for Montgomery et al.

The opinion of the court was delivered by

NAPTON, J.—The principal grounds upon which an injunction is asked are: First, that the reversal of the judgment destroyed the title of Nussberger under the execution sales, and, secondly, that Vogler's claim of the property as a homestead rendered the sale and purchase of Nussberger a nullity; and these are the only questions of importance, whether it be held that it was a case for injunction or not.

There is no question that a reversal of a judgment does not invalidate sales under executions to strangers who purchase at the sale, but as to parties to the judgment the law seems to be settled otherwise; and if they become purchasers they take a title subject to the ultimate disposition of the case. In this case the plaintiff in the judgment buys and of course his title is affected by the infirmity, but he conveys to a third person before the judgment is reversed, and the question is whether this infirmity attaches to the purchaser. In *Gott v. Powell*, 41 Mo. 420, the court excepted the case where some third person has acquired a "collateral right before reversal." The purchaser in such cases must be regarded as a purchaser without notice, since he buys from a party who derives title from a judgment and execution valid at the time, and really occupies the same position as if he had himself bought at the sheriff's sale. Whilst therefore the title of the plaintiff in the execution would be annulled by the reversal of the judgment, the sale or conveyance by the plaintiff to a third person before the reversal of the judgment would be valid, and the purchaser, supposing the purchase to be in good faith, would be protected from the risks which his vendor would be subject to. In this case the deed to Montgomery was made four days before the reversal of the judgment under which Nussberger bought, and, so far as this point is concerned, he must be regarded as having acquired a good title.

But it is further objected that the sheriff's sale was void because of the property being claimed as a homestead, and therefore protected from execution by our statute on that subject.

The construction of our homestead laws, 1 Wagner's Statutes, p. 697, has never so far as I have observed been before this court; so we are left to resort to the general practice of all courts in construing obscure and doubtful provisions of a statute to carry out as

nearly as possible what is believed to be its main scope and design, and in this we may be guided to some extent by adjudications in other states where similar laws have long existed. It seems too well settled in the various courts in states where the homestead law has been discussed, that such laws, being prompted by benevolent intentions, are to be liberally construed, and in such way as to promote the design of securing to a family a home protected from the creditors of the person who is its head.

It is easy to foresee or imagine cases in which the ministerial officers, who are to be governed by it, must be greatly embarrassed in regard to their duty in executing some of its provisions, but I do not propose to anticipate difficulties which may not occur or which future legislation may remove.

The points which arise on the present record have been mostly passed on by courts of the last resort having similar statutes to ours.

Our statute limits the homestead in Sedalia where this case originated, to thirty square rods of ground in extent, and in value not to exceed \$1500. The second section of the act allows the housekeeper or head of the family in cases where the limitation is exceeded either as to quantity or value, to designate or choose such part as will not exceed the limitation, and provides that where there is such designation or choice, or where there is none made, in either event the sheriff shall appoint three appraisers to fix the boundaries and location of the homestead, and that the sheriff shall *then* proceed with the levy of the execution on the residue of the real estate.

We infer from this section that in a case where a homestead is claimed, the sheriff cannot proceed with the levy until he has thus appointed appraisers; nor does it seem to be material whether the housekeeper or the head of the family asserts his claim or not.

It may be that he is absent. This law is for the benefit of the family, the wife and children as well as the head of the family. The occupancy of the house as a family residence is a fact easily ascertained by the officer. He cannot proceed with his levy until he has ascertained in the mode directed by the act, the extent and the value of the premises, and that it is beyond the limit protected against executions.

The question of the title, we suppose, was not to be investigated by the sheriff. If the householder had no title the execution and

levy was of course unavailing, and the law was designed to protect his possession. If, however, there was an encumbrance on the property merely, the third section of the act directs how that is to be considered.

In this case it appears that Vogler had prior to the levy conveyed his title to the premises to one Suess, and upon this ground it is claimed that he forfeited all the protection which the homestead law gives. If this conveyance was in good faith, and valid, then it is obvious that an execution and a sale under it would convey nothing; but if it was fraudulent, as it doubtless was deemed to be by the execution-creditor, then the title was in Vogler, and the homestead law exempted it from execution. It appears to be the received opinion that neither a fraudulent conveyance nor an act of bankruptcy on the part of the head of the family will produce a forfeiture of the benefits of the homestead exemption: *Cox v. Wilder*, 2 Dillon C. C. 46. Judge DILLON thinks these laws are chiefly for the benefit of the family and therefore will not allow the fraudulent acts of the head of the family to subvert the policy of the law, and this opinion was upon our Missouri Statute.

As Nussberger then derived no title from either execution, levy or sale, he could convey none to Montgomery, and the proposed sale by Montgomery would convey no title. And this is urged as a reason why no injunction should be allowed.

But it is the true policy of courts to prevent litigation, and a sale by the trustee would undoubtedly cast a doubt over plaintiff's title, and embarrass a sale, if he desired to sell.

The judgment is affirmed.

LEGAL NOTES.

ACTS OF THE LEGISLATURE—PRESUMPTION AS TO THEIR VALIDITY.—The justices of the Supreme Court of New Hampshire, in answer to a communication from the Governor of the State, requesting their opinion on the validity of an Act of the Legislature, which though it was found in the office of the Secretary of State with other acts passed at the same session, and was signed by the Speaker of the House of Representatives, the President of the Senate, and by the Governor himself, had never in fact passed the House, replied that it was their unanimous opinion that although the finding of an Act of the Legislature in the proper repository, and properly and legally signed, is *prima facie* evidence that the said act had been passed in the manner required by the Constitution to make it a valid statute: Nevertheless, the journals